No. 93-

93-300

In The Supreme Court Of The United States

Supreme Court U.S.
FILED
SEP 2 1993
OFFICE OF THE CLERK

OCTOBER TERM, 1993

THE STATE OF NORTH CAROLINA,

Respondent,

v.

JIMMY RAY NOBLES,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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PUBLISHER'S NOTE:

The following page is unavailable for filming;

Pg. 1

QUESTIONS PRESENTED

I. DID THE TRIAL COURT DECIDE CORRECTLY THAT N.C.G.S. 113-136(k) UNCONSTITUTIONALLY IMPINGES UPON THE CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES BY PURPORTING TO ALLOW UNLIMITED WARRANTLESS ADMINISTRATIVE SEARCHES AND BY AUTHORIZING CRIMINAL SANCTIONS FOR REFUSING TO CONSENT TO SUCH WARRANTLESS SEARCHES?

TABLE OF CONTENTS AND AUTHORITIES

TABLE OF CONTENTS

Opinions Below 6

Jurisdiction. 6

Questions Presented 2

Statutes and Constitutional Provisions Involved 7

Statement of the Case 10

Reasons for Granting this Writ 12

Conclusion 19

Appendix A:
Order Granting Motion to Dismiss Pitt County Superior Court 1
Opinion of the North Carolina Court of Appeals 3
Opinion of the North Carolina Supreme Court 56
N.C.G.S. 113–136 57
N.C.G.S. 113–164 66

TABLE OF CASES AND AUTHORITIES

New York v. Burger, 482 U.S. 691 (1987). . . . . *passim*

State v. Nobles, 107 N.C.App. 627, 422 S.E.2d 78, aff'd, 333 N.C. 787, ___ S.E.2d ___ (1993) 6

Tart v. Massachusetts, 949 F.2d 490 (1st Cir. 1991). 14

ADDITIONAL AUTHORITIES

STATUTES

28 U.S.C. 1257 7

N.C. Gen. Stat. 113–134.1 . . . . . 8, 15

N.C. Gen. Stat. 113–136 . . . . . *passim*

N.C. Gen. Stat. 113–137(a) 7

N.C. Gen. Stat. 113–164. . . . . .8, 15

N.C. Gen. Stat. 113–183(a) 9, 15

CONSTITUTIONAL PROVISIONS

U. S. CONST. amend. IV. 9

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

The State of North Carolina, Respondent

vs.

Jimmy Ray Nobles, Petitioner

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Jimmy Ray Nobles, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above entitled case on June 4, 1993.

Opinions Below

The Order of the Pitt County Superior Court granting the Petitioner's motion to dismiss and declaring the state statute under which the defendant was charged unconstitutional under the Fourth Amendment to the United States Constitution is printed in Appendix A hereto, infra, pp. 1–2. The Opinions of the North Carolina Court of Appeals are reported at 107 N.C.App. 627, 422 S.E.2d 78 and is printed in Appendix A hereto, infra, page pp. 3–55. The Opinion of the Supreme Court of North Carolina is reported at 333 N.C. 787, _____ S.E.2d _____ and is printed in Appendix A hereto, infra, page pp. 56.

Jurisdiction

The Supreme Court of North Carolina (Appendix A, infra, page p.56) rendered its decision on June 4, 1993. The

jurisdiction of the Court is invoked pursuant to United States Code Title 28, Section 1257.

The jurisdiction of this Court is invoked on the ground that the validity of North Carolina General Statute section 113–136 is challenged as being repugnant to the Fourth Amendment to the Constitution of the United States.

Statutes and Constitutional Provisions Involved

North Carolina General Statute Section 113–136, a copy of which is printed in Appendix A hereto, infra, p. 57. 113–136(k) reads as follows:

> It is unlawful to refuse to exhibit upon request by any inspector, protector, or other law enforcement officer any item required to be carried by any law or rule as to which inspectors or protectors have enforcement jurisdiction. The items that must be exhibited include boating safety or other equipment or any license, permit, tax receipt,

> certificate, or identification. It is unlawful to refuse to allow inspectors, protectors or other law enforcement officers to inspect weapons, equipment, fish, or wildlife that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction.

North Carolina General Statute Section 113-134.1, which reads as follows:

> The Marine Fisheries Commission is directed to exercise all regulatory authority over the conservation of marine fisheries resources in the Atlantic Ocean to the seaward extent of the State Jurisdiction over the resources as now or hereafter defined. Marine fisheries inspectors may enforce these regulations and all other provisions of law applicable under the authority granted in this section in the same manner and with the same powers elsewhere granted them as enforcement officers.

North Carolina General Statute Section 113-164, a copy of which is printed in Appendix A hereto, infra, p. 66, reads in relevant part as follows:

> The Marine Fisheries Commission may make reasonable rules governing possession, transportation, and disposition of fisheries resources by all persons, including those not subject to fish-dealer licensing requirements . . . .

North Carolina General Statute section 113-183(a) reads as follows:

> It is unlawful to possess, transport, offer to transport, sell, offer to sell, receive, buy, or attempt to buy any fish regulated by the Department with knowledge or reason to believe that such fish are illicit.

United States Constitutional Amendment IV:

AMENDMENT IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Statement of the Case

–Procedural History:

On March 6, 1990, the Defendant, Jimmy Ray Nobles, was charged with Refusing to Allow an Inspection pursuant to North Carolina General Statute 113–136. The Pitt County District Court found the defendant guilty on July 11, 1990. This conviction was appealed to the Pitt County Superior Court. On August 8, 1990, Nobles filed a motion to dismiss the charges alleging that the statute under which he was charged, N.C. Gen. Stat. 113–136, allows unreasonable warrantless searches and seizures in violation of the Fourth Amendment of the United States Constitution. The case came on for hearing before the Honorable William C. Griffin, Jr., Superior Court Judge, at the February 11, 1991 Criminal Session of Pitt County Superior Court.

After considering arguments of counsel, Judge William C. Griffin, Jr. found the statute unconstitutional and granted the Defendant's Motion to Dismiss. The State gave Notice of Appeal on February 22, 1991, assigning as error Judge Griffin's ruling that N.C. Gen. Stat. 113-136(k) was unconstitutional.

The North Carolina Court of Appeals held that the Trial Court's conclusion that N.C. Gen. Stat. 113-136(k) was unconstitutional under the Fourth Amendment of the United States Constitution was erroneous, and reversed the Trial Court. Nobles appealed as of right to the North Carolina Supreme Court. By opinion dated June 4, 1993, the North Carolina Supreme Court affirmed the Court of Appeals ruling in a *per curium* decision.

—Statement of Facts:

On March 6, 1990, the Defendant, Jimmy Ray Nobles, was charged with Refusing to Allow an Inspection pursuant to N.C. Gen. Stat. 113—136. The inspecting officers had no warrant authorizing the search. There was no evidence presented in the Superior Court proceedings.

Reasons for Granting This Writ

The challenged state statute allows broad, virtually unrestricted, warrantless searches of anyone within the State of North Carolina who is reasonably believed to possess marine fisheries resources. The provision is repugnant to and violative of the Fourth Amendment of the United States Constitution and United States Supreme Court decisions interpreting the same.

The United States Supreme Court has recognized that in certain very narrowly restricted circumstances involving closely regulated industries, warrantless searches are constitutional.

In United States v. Burger, this Court set forth the standard of review applicable to the case at bar. 482 U.S. 691 (1987). Burger sets out a three-prong analysis of warrantless inspections such as the one at issue herein.

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . Second, the warrantless inspections must be "necessary to further [the] regulatory scheme. . . . Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." (citations omitted)

Id. at 702-03. The third prong of Burger requires (1) constraints on the

official's discretion respecting the time, place and scope of the search and (2) that the applicable statute advise the searched entity that the search is being made pursuant to the law and has a properly defined scope. *Id.* at 703; Tart v. Massachusetts, 949 F.2d 490, 498 (1st Cir. 1991). The third prong of the Burger analysis is not satisfied in this case.

The statute at issue, North Carolina General Statute section 113–136 (hereinafter referred to as "the Statute"), places no meaningful constraints on the inspecting officials discretion, and provides no constitutionally adequate substitute for a warrant. It is clear that, in light of the regulatory scheme as a whole, the Statute allows the search of persons and places outside of the regulated industry,

even those not subject to the licensing requirements.

Possession of marine fisheries resources is an activity regulated by the state law and rules as to which Marine Fisheries Inspectors have enforcement jurisdiction. *See* N.C. Gen. Stat. 113-164 ("The Marine Fisheries Commission may make reasonable rules governing possession . . . of fisheries resources by all persons, including those not subject to fish-dealer licensing requirements"); *see also* N.C. Gen. Stat. 113-134.1 ("Marine fisheries inspectors may enforce these regulations and all other provisions of law applicable under the authority granted in this section"). Possession of fish is not only regulated by Marine Fisheries Commission rules, but also by statute. N.C. Gen. Stat. 113-183 provides that "[i]t is unlawful to

possess, transport, offer to transport, sell, offer to sell, receive, buy, or attempt to buy any fish regulated by the Department with knowledge or reason to believe that such fish are illicit." Since N.C. Gen. Stat. 113-136(k) grants Law Enforcement Officers, Inspectors and Protectors the right to search persons and places engaged in activities "regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction," any person possessing, buying, selling or transporting marine fisheries resources is subject to warrantless search.

The Statute fails the Burger analysis for the following reasons:

(1) There are no meaningful restrictions restrictions as to place, specifically licensed premises or vehicles;

(2) The warrantless searches are not restricted to the regulated industry as anyone reasonably believed to possess marine fisheries resources is subject to the search authority of any law enforcement officer;

(3) There are no temporal restrictions;

(4) The statute does not provide the affected population (the general public) with notice of the potential for warrantless inspections;

(5) There is no limitation on the frequency or duration of the searches, leaving the number of searches of a person which an officer may conduct over any given period to the unbridled discretion of the officer;

(6) There is a criminal penalty for refusing to allow a warrantless search,

including the possibility of incarceration;

(7) The broad enforcement jurisdiction of the officers authorized under the statute to perform the warrantless searches creates a potential for the use of the warrantless search provisions to enforce other statutes or to discover other criminal activity.

(8) The searches are not required to be conducted with such certainty regularity as to place the affected population (the general public) on notice of the purpose, scope and authority for the search.

North Carolina General Statute section 113-136(k) makes it undeniably clear that any person who is reasonably believed to possess marine fisheries resources can be searched by any Law Enforcement Officer, inspector or

protector, at any time, day or night, at any place, except within the curtilage of a home or the living quarters of a vessel. This violates the protections afforded by the Fourth Amendment to the Constitution of the United States, and is inconsistent with this Court's ruling in United States v. Burger.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

COUNTY OF PITT SUPERIOR COURT DIVISION

FILE NO. 90-CRS-5073

STATE OF NORTH CAROLINA,

VS. ORDER

JIMMY RAY NOBLES,

DEFENDANT.

This cause came on for trial before the undersigned Judge Presiding at the February 11 , 1991, Criminal Session of Superior Court of Pitt County.

The Court finding that prior to jury selection the defendant made a motion to dismiss on the grounds that the statute under which the defendant is criminally charged is unconstitutional.

After considering the arguments of the District Attorney and Counsel for the Defendant, the criminal charge, and the statute; the Court concludes as a matter of law that General Statute 113-136(k) is

unconstitutional in that it makes unlawful the exercise of one's Constitutional right to be free from unreasonable searches and seizures.

Entered this 14th day of February, 1991.

/s/

William C. Griffin
Judge Presiding

No. 913SC627

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 1992

STATE OF NORTH CAROLINA

V.

JIMMY RAY NOBLES

Pitt County

No. 90CRS5073

Appeal by the State from order entered 14 February 1991 by Judge William C. Griffin, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 18 February 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General J. Allen Jernigan, for the State appellant.

Pritchett, Cooke & Burch by Lloyd C. Smith, Jr., and David J. Irvine, Jr., for defendant appellee.

COZORT, Judge.

On 6 March 1990, Jimmy Ray Nobles was charged with refusing to allow an

inspection of a licensed fish dealership, "West End Seafood," in Greenville, North Carolina, pursuant to N.C. Gen. Stat. 113–136(k). When defendant refused to allow two officers to inspect fish being sold on the premises, the officers subsequently obtained a search warrant and issued a misdemeanor citation to defendant for the refusal. The trial judge granted defendant's motion to dismiss the charge on the grounds that 113136(k) allows unreasonable warrantless searches and seizures in violation of the Fourth Amendment. The State appeals.

The only issue presented is whether the trial court decided correctly that N.C. Gen. Stat. 113–136(k) on its face violates the constitutional right to be free from unreasonable searches and seizures by permitting warrantless administrative searches of commercial

premises. We find the statutory provision in question does not violate the Fourth Amendment and reverse the trial court's order striking down the subsection in its entirety.

The statutory section authorizing the warrantless inspections reads as follows:

> It is unlawful to refuse to exhibit upon request by any inspector, protector, or other law enforcement officer any item required to be carried by any law or rule as to which inspectors or protectors have enforcement jurisdiction. The items that must be exhibited include boating safety or other equipment or any license, permit, tax receipt, certificate, or identification. *It is unlawful to refuse to allow inspectors, protectors, or other law enforcement officers to inspect weapons, equipment, fish, or wildlife that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction.*

N.C. Gen. Stat. 113-136(k) (Cum. Supp. 1991) (emphasis added). We note at the outset that although the trial court's order struck down N.C. Gen. Stat. 113-136(k) in its entirety, we are concerned only with the latter portion of the subsection which is highlighted above. The parties agree that the initial provision of the statute making it unlawful to refuse to exhibit licenses, permits, etc., is not the primary source of contention, since this provision was not before the trial court on defendant's motion to dismiss. We therefore have narrowed our review to the emphasized section, in considering only the constitutionality of the statute as it relates to the inspection of fish or fishing equipment possessed incident to regulation. Our inquiry concerns inspections of fish at various locations,

including boats, docks, fish houses, and other commercial dealerships. No evidence has been presented, nor are there arguments before this Court, challenging the constitutionality of the statute as it governs the inspection of weapons or wildlife, since those items do not fall immediately within the inspection powers of the Marine Fisheries Commission. Our analysis is therefore limited to the question of whether a warrantless inspection of a fish dealership pursuant to the above statute violates the Fourth Amendment to the United States Constitution.

The Fourth Amendment protects individuals from unreasonable searches and seizures. The purpose of the amendment is to impose a requirement of "reasonableness" upon the exercise of discretion by government officials in

order "to safeguard the privacy and security of individuals against arbitrary invasions." *Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L.Ed.2d 930, 935 (1967). The Fourth Amendment applies to administrative inspections of private commercial property. *See v. City of Seattle*, 387 U.S. 541, 546, 18 L.Ed.2d 943, 948 (1967). A government search of private property without consent is considered a violation of the Fourth Amendment unless it is conducted pursuant to a valid search warrant or falls within one of a few narrowly defined exceptions. *Camara*, 387 U.S. at 528–29, 18 L.Ed.2d at 935. Reviewing courts must apply a case–by–case analysis when determining whether a regulatory scheme including warrantless inspections is reasonable under the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321, 56 L. Ed. 2d

305, 317 (1978) . What is reasonable depends on the expectation of privacy in the area searched, the importance of the governmental interest justifying the search, and the degree to which the authority given for the search is tailored to that interest in order to minimize intrusion. *Donovan v. Dewey*, 452 U.S. 594, 69 L.Ed.2d 262 (1981). Warrantless inspections of commercial property may be unreasonable if they are unnecessary to further important governmental interests, or if their occurrence is so random, infrequent, or unpredictable that the owner has no real expectation that the property will from time to time be inspected. *Id.* at 599, 69 L.Ed.2d at 269. Where, however, a regulatory scheme does protect business owners from being exposed to the "almost unbridled discretion [of] executive and

administrative officers, particularly those in the field, as to when to search and whom to search," *Marshall*, 436 U.S. at 323, 56 L.Ed.2d at 317–18, statutes authorizing warrantless administrative searches may pass constitutional muster.

As a threshold matter, it is important to note "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home." *Donovan*, 452 U.S. at 598–99, 69 L.Ed.2d at 269. An individual engaged in an industry that is pervasively regulated by the government or which has been traditionally the target of close scrutiny is generally considered to be on notice that periodic inspections will occur and, consequently, has no reasonable expectation of privacy in the areas where he knows those

inspections will occur. *Id.* at 606, 69 L.Ed.2d at 273–74. Several cases demonstrate the exemptions from the warrant requirement: in *Donovan*, 452 U.S. 594, 69 L.Ed.2d 262, the Supreme Court upheld warrantless inspections of stone quarries authorized by the Federal Mine and Safety Act; in *United States v. Biswell*, 406 U.S. 311, 32 L.Ed.2d 87 (1972), warrantless inspections of firearms in pawnshops were upheld pursuant to the Gun Control Act; and in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 25 L. Ed. 2d 60 (1970), warrantless inspections of businesses holding alcoholic beverage licenses were found to be reasonable.

Defendant argues the coastal fishing industry is not closely regulated in our state. We disagree. Few industries are as "pervasively regulated" as the

commercial fishing business. The fishing industry has been the subject of close regulation "almost since the founding of the Republic." *Lovgren v. Byrne*, 787 F.2d 857, 865 (3d Cir. 1986) . Government regulation of the f ishing industry has been ongoing since at least 1793 when licenses were required for vessels to engage in cod and mackeral fishing. *See* Act of Feb. 18, 1793, 1 Stat. 305. The same may be said regarding regulation of the fishing industry in our state. *See State v. Sermons*, 169 N.C. 285, 84 S.E. 337 (1915); N.C. Gen. Stat. 113136 (Session Laws 1915, Chapter 84, Section 6). Today, it is well recognized that the coastal fishing industry is "closely regulated" because of the pervasive regulation within the industry and the substantial government interests implicated in managing and conserving

fishery resources. *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991) ; *Lcvgren v. Byrne*, 787 F. 2d 857 (3d Cir. 1986); *United States v. Kaiyo Maru*, 699 F.2d 989 (9th Cir. 1983). We find the business operated by defendant, a wholesale fish dealership, to be closely regulated in our state for purposes of evaluating the expectation of privacy involved in determining whether a Fourth Amendment violation has occurred.

In *New York v. Burger*, 482 U.S. 691, 96 L.Ed.2d 601 (1987), the United States Supreme Court articulated a specific test to be applied when deciding the propriety of administrative inspections of pervasively or closely regulated industries. The Court, prefacing the test, explained, "where the privacy interests of the owner are weakened and the government interests in regulating

particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Id.* at 702, 96 L.Ed.2d at 61314.

> This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made . . . .
>
> Second, the warrantless inspections must be "necessary to further (the] regulatory scheme." . . . .
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid(e] a constitutionally adequate substitute for a warrant." In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is

> being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

Id. at 702–03, 96 L.Ed.2d at 614 (citations omitted).

Here, application of the *Burger* analysis reveals that N.C.Gen.Stat. 113–136(k) and the regulatory scheme adopted thereunder meet all three prongs of the test necessary to fall within the exception to the warrant requirement for administrative inspections of closely regulated businesses. The first two prongs of the *Burger* test are satisfied easily. According to the North Carolina Fisheries Rules for Coastal Waters, the Marine Fisheries Division

> is charged with the stewardship of the marine and estuarine resources of the State of North Carolina and is responsible for the management of all marine and estuarine resources. This responsibility includes the administration and enforcement of all statutes and rules

> governing commercial and recreational fishing in coastal waters, the development and improvement of the cultivation and harvesting of shellfish, and submerged land claims in North Carolina.
>
> * * * * * *
>
> .. . The rules are designed to carry out, in part, the duty of the Division of Marine Fisheries to maintain, preserve, protect, and develop all the marine and estuarine resources of the State.

N.C.Admin.Code tit. 15A, r. 3H.0002(a) and (d) (1991). Fish are a valuable natural and economic resource for which stringent governmental protection is essential. We find the maintenance, preservation, protection and development of our state's marine resources serve as substantial public and important state interests to support fishing industry regulation. These interests are in turn furthered by a regulatory scheme which includes warrantless inspections. Warrantless inspections of marine fish

are necessary for many reasons. First, fish are highly perishable products which are extracted from coastal waters and then injected rapidly into the stream of commerce by being transported or sold. Due to such high perishability and portability, the time during which inspectors may check fish is limited. While a fisheries inspector is obtaining a warrant, fish dealers may dispose of fish which are possessed in violation of size and quantity limitations. Secondly, as a practical matter, "[t]he logistical problems in establishing a successful inspection program requiring warrants are insurmountable" in the fishing industry. *Kaiyo Maru*, 699 F.2d at 996. Fishing is a highly variable activity, and with respect to fish being possessed on boats, at docks, in trucks, and even in markets, procuring a warrant is often impractical.

Fishing itself is an ongoing process which fluctuates based on variables such as the weather. It follows then, that the transportation of fish and the eventual arrival of fish at wholesale and retail fish dealerships also varies. Requiring a warrant to inspect boats, docks, trucks, and for purposes of this case, the fish houses, would frustrate the effectiveness of the inspections.

> Unlike *See v. City of Seattle*, . . . a case involving housing code violations, and *Marshall V. Barlow's Inc.*, ... a case involving OSHA inspections, the government in this case will rarely have time to obtain a warrant before the status quo is changed. The fish are highly perishable and even in the best of circumstance are unlikely to remain on the docks for any length of time. Moreover, it would often be difficult to obtain a warrant in advance since the purpose of inspection will frequently be limited to obtaining information, not seeking out wrongdoers.

Lovgren, 787 F.2d at 866. Lastly, imposing a warrant requirement renders the inspections meaningless. If fishermen or fish dealers have knowledge of upcoming checks, the probability of violations would be low, since violators would circumvent the law by concealing unlawful activity. "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Biswell*, 406 U.S. at 316, 32 L.Ed.2d at 92. Unannounced inspections ferret and discipline those entities which disobey the law. Warrantless inspections thus are needed to provide close regulation of the fishing industry —regulation which is necessary to promote our state's interests in preserving a natural resource. A warrant requirement would

impede the specific enforcement needs of the statutory scheme.

We now reach the third prong of the *Burger* test, which measures whether the statute allowing warrantless inspections is structured in order to limit the discretion of the inspecting officers, thus providing a "',constitutionally adequate substitute for a warrant.'" *Burger*, 482 U.S. at 703, 96 L.Ed.2d at 614 (quoting *Donovan*, 452 U.S. 594, 600, 69 L. Ed. 2d 262, 270). To meet the third prong of the test, the statutory provision must (1) notify property owners that they ""will be subject to periodic inspections undertaken for specific purposes,"' *id.*, and (2) carefully limit official discretion as to the time, place, and scope of the inspections. *Biswell*, 406 U.S. at 315, 32 L.Ed.2d at 92. After analyzing the statutory

framework in light of current law, we are of the opinion the statute constitutes an adequate substitute for a warrant.

First, we cannot say those who hold commercial fishing dealership licenses are completely unaware of the possibility of periodic inspections of their products and equipment. Participation in a closely regulated business in and of itself places a fish dealer on notice that inspections are certain to occur. The cases recognize this type of constructive notice in these pervasively regulated industries. For instance, in *Biswell*, the Supreme Court found warrantless inspections of firearms pursuant to S 923 of the Gun Control Act of 1968 not violative of the Fourth Amendment. The statute gave treasury agents the authority to enter the premises of any firearms dealer during

business hours for the purpose of inspecting or examining any records or documents required to be kept and any firearms or ammunition kept or stored by such dealer. *Id.* at 311–12, 32 L.Ed.2d at 90. In finding the statute valid, the Court stated:

> [I]nspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

Id. at 316, 32 L.Ed.2d at 92–93. The same rationale was applied in *Donovan* where the Court upheld inspections of stone quarries under sec. 103(a) of the Federal Mine Safety and Health Act of 1977. The *Donovan* Court indicated that warrants may not be necessary when

searches are needed to further the regulatory scheme, and the "owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan*, 452 U.S. at 600, 69 L.Ed.2d at 270. Similarly, in the present case, the statute and its surrounding regulatory scheme put the commercial fish dealer on notice concerning the inevitability of inspections. Courts have examined other portions of the pertinent regulatory scheme to determine whether or not the provision adopting warrantless inspections gives the individual subject to inspection proper notice. *See, i.e.*, *Donovan*, 452 U.S. at 604–05, 69 L.Ed.2d at 272. In addition to the subsection at issue, other provisions within the regulatory framework of the subchapter

governing the conservation of marine and estuarine resources specify that licensed commercial fish dealers will be subject to inspections. For example, the statutory section which enumerates the prerequisites for obtaining a fish dealer's license notifies the dealer that his or her business will be subject to periodic inspections of records.

> Every fish dealer subject to the licensing provisions of this section must secure a separate license or set of licenses for each established location. Where a dealer does not have an established location for transacting the fisheries business within the State, the license application must be denied unless the applicant satisfies the Secretary that his residence, or some other office or address, within the State, is a suitable substitute for an established location and that records kept in connection with licensing, sale, and tax requirements *will be available for inspection when necessary*.

N.C. Gen.Stat. 113-156(d) (Cum.Supp. 1991) (emphasis added). These statutes and the corresponding regulations implemented by the Marine Fisheries Commission are part of the public record and are also published in the Fisheries Rules for North Carolina Coastal Waters. These provisions give adequate notice to fish dealers that their premises are subject to inspection.

Additionally, commercial fish dealers, by procuring a fish dealer's license, impliedly consent to such inspections. In a case similar to the case at bar, a court upheld the warrantless search of a wholesale fish dealer's facility. That court stated:

> The central precept to be found in *Colonnade*, *Biswell*, and *Donovan* is that, in undertaking to engage in a highly regulated and licensed enterprise, the entrepreneur thereby consents to the array of regulations associated with the trade; that

> is, its burden as well as its benefits. The businessman engaged in such a trade cannot but reasonably anticipate that his establishment is subject to periodic inspections undertaken to further the regulatory objective.

People v. Harbor Hut Restaurant, 148 Cal. App. 3d 1151, 1154–55, 196 Cal. Rptr. 7, 9 (1983). Implied consent was also a factor in upholding warrantless inspections of fishing vessels in *Tallman v. Dep't of Natural Resources*, 421 Mich. 585, 365 N.W.2d 724 (1984). The *Tallman* court determined that licenses issued to the commercial fishermen gave them direct notice that warrantless searches of business premises could be performed at any time as a condition of receiving the license. The court noted, "Neither commercial fishers nor other business people can be required to surrender their constitutionally protected rights in exchange for the privilege of doing

business. However, anyone engaged in the commercial fishing business must be prepared to submit to reasonable regulations and, consequently, to diminished expectations of privacy." *Tallman*, 421 Mich. at 629, 365 N.W.2d at 744 (citation omitted).

The courts of our state have also acknowledged that acceptance of certain licenses creates an implied consent to inspections where pervasively regulated industries are concerned. In *Greensboro Elks Lodge v. N.C. Bd. of Alcoholic Control*, 27 N.C. App. 594, 603, 220 S.E.2d 106, 112 (1975), *cert. denied*, 289 N.C. 296, 222 S.E.2d 696 (1976), this Court held "that by seeking a permit, petitioner waived its Fourth Amendment right to the limited extent of inspection incident enforcement of State A.B.C. regulations." This holding was based on a

recognition of the implied consent doctrine in our state. The alcoholic beverage statute which authorizes inspection of licensed premises permits officers

> to investigate the operation of each licensed premises for which an ABC permit has been issued, to make inspections that include viewing the entire premises, and to examine the books and records of the permittee. The inspection authorized by this section may be made at any time it reasonably appears that someone is on the premises.

N.C. Gen.Stat. 18B—502(a) (1989). The statute provides for the revocation or suspension of an A.B.C. permit where a permittee refuses inspection. N.C.Gen.Stat. 18B—502(b) (1989). Any resistance of an inspection is a misdemeanor where a permittee obstructs an officer's attempt to make a lawful inspection. *Id.* The Court in *Greensboro Elks Lodge* found the licensed dealers to

have impliedly consented to inspection by looking to other licensing statutes as support. For example, our state has adopted a motor vehicles statute in which automobile drivers give implied consent to a chemical analysis when charged with an implied-consent offense. N.C.Gen.Stat. 20-16.2 (Cum. Supp. 1991). *See also* N.C.Gen.Stat. 20-16 (Driver's License Suspension).

The commercial fish licensing statute and its provision for inspection are comparable. The inspection provision allows inspections day or night and carries a punishment for any refusal to inspect. "Indeed the expectation of finding the game warden looking over one's shoulder at the catch is virtually as old as fishing itself." *Lovgren*, 787 F.2d at 865. We do not find that an implied consent to search or inspect

certain items or areas automatically attaches with an issuance of any given license in our state. However, the similarity of a commercial fishing license to an alcoholic beverage license compels us to find implied consent in this instance. We emphasize the final holding of this case does not rely solely on a consent to search or waiver theory. Consent is significant as evidence that commercially licensed fish dealers are on notice that periodic inspections can be expected. The defendant appellee holds a commercial fish dealer's license and has knowledge that periodic inspections are a regular component of the enforcement scheme. Resultingly, as in *Greensboro Elks Lodge*, he agreed to the inspections by accepting the rights and responsibilities which necessarily follow with the acquisition of the license.

We now turn to the final inquiry with respect to the *Burger* test. Warrantless searches of commercial property are permissible where the benefits of the warrant process would be minimal since inspections are conducted within "the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope." *Biswell*, 406 U.S. at 315, 32 L.Ed.2d at 92. Defendant appellee argues that because N.C.Gen.Stat. 113136(k) does not circumscribe any limitation as to when the warrantless searches must occur, the statute is unconstitutional. In the *Burger* case, the New York statute authorized police officers to inspect automobile junkyards "',during [the] regular and usual business hours.'" *Burger*, 482 U.S. at 711, 96 L.Ed.2d at 619. The statutory provision in the

present case has no such time limitation. Although N.C.Gen.Stat. 113–136 does not state explicitly a time limitation dictating when inspections may occur, this omission is not fatal. A careful reading of *Burger* discloses that the time, place, and scope limitations are only *factors* to consider in evaluating the constitutionality of the statute; they are not dispositive. A footnote in the case states:

> Respondent contends that sec. 415–a5 is unconstitutional because it fails to limit the number of searches that may be conducted of a particular business during any given period. . . . While such limitations, or the absence thereof, are a factor in an analysis of the adequacy of a particular statute, they are not determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers. Indeed, we have approved statues authorizing warrantless inspections even when such statutes did not establish a

> fixed number of inspections for a particular time period. And we have suggested that, in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme.

Burger, 482 U.S. at 711, 96 L.Ed.2d at 619 n.21 (citations omitted).

Courts reviewing statutes allowing warrantless searches lacking time constraints on the searches have consistently employed the "factor" analysis and have upheld certain statutes which otherwise limit officers, discretion. For instance, in *United States v. Dominguez-Prieto*, 923 F.2d 464, 466, (6th Cir. 1991), *cert. denied*, U.S. _____, 114 L.Ed.2d 468 (1991), the court upheld a statute which allowed enforcement officers to stop motor vehicles and to inspect the contents of motor vehicles "upon reasonable belief that any motor vehicle is being operated in violation of any provisions of this

part . . . ." The statute in *Dominguez-Prieto* specifically gave Tennessee Public Service Commission officers the authority to "[l]icense, supervise and regulate every *motor carrier* in [the] state," and included the power to inspect contents of the trucks for purposes of comparing bills of lading with invoices or other evidence of ownership or of transportation for compensation. *Id.* at 465-66. In upholding the search provision, the court indicated the only differentiation between the statutory inspection scheme in *Burger* and the Tennessee statute was the limitation on time. The *Dominguez-Prieto* court reasoned:

> The statutory scheme at issue here does not limit the time frame within which such inspections are permitted. Such a limitation would, of course, render the entire inspection scheme unworkable and meaningless. Trucks

> operate twenty-four hours a day and the officers must, necessarily, have the authority to conduct these administrative inspections at any time. Thus, this difference between the statutes is inconsequential.

Id. at 470. Courts which have examined statutes similar to the one in the present case have upheld such statutes despite the failure to impose explicit restrictions as to times when inspections may occur. In *Lovgren*, the court found the Magnuson Act provision authorizing warrantless inspections of fishing vessels to be carefully tailored since the inspections were "limited to only those times when and those places where groundfish may be found." *Lovgren*, 787 F.2d at 867. Similarly, in *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991), the court concluded that a statute authorizing warrantless documentation checks of commercial fishing vessels need not contain an explicit "checklist" of

time and place limitations for conducting documentation inspections. The court in *Tart* considered the lack of time limitations in the context of the entire regulatory scheme applicable to the commercial fishing industry and found "[t]he lack of explicit constraints on the officers' discretion is not determinative." *Tart*, 949 F.2d at 499.

Limitations as to frequency and time, then, are only factors to consider in the test. Because the statute in the case at bar governs all aspects of the commercial fishing process—on the water, at the dockside, in transit and in the marketplace—we do not agree that a failure to delineate times for searches automatically dooms the entire statute. Here, time limits on inspections, as in *Dominguez-Prieto*, would not be feasible particularly because of the ongoing

variable activities of commercial fishing. As the other cases involving commercial fishing inspections indicate, the statute allows inspectors the flexibility and convenience to inspect fish while they are being held at varying stages of the commercial fishing process. We adopt the reasoning of those cases. Defendant appellee contends nothing in the statute limits the officers' discretion in that officers may target certain individuals or businesses for frequent and unjustified spot checks. Whether such an application of the statute is unconstitutional is not before us; defendant has challenged the statute solely on its face. No evidence is before the Court to suggest defendant appellee was or would become a "target" of fish inspectors. If such were to happen, any challenge to the statute

would be grounded on the unreasonableness of the provision in *its application, not on its face.* We therefore find the statute's failure to specify time limits is not constitutionally fatal.

As to limitations on what places may be searched, the section at issue* is sufficiently limited. Searches may occur only in places where fish are "possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction." N.C.Gen.Stat. 113-136(k). These areas would include fishing vessels, docks, trucks, and markets. The inspections are limited by the following subsection which provides, "[n]othing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional

prohibitions against unreasonable searches and seizures." N.C.Gen.Stat. 113-136(1). The higher expectation of privacy as to private areas is therefore preserved by limiting the places where fisheries commission officers may conduct the searches.

Finally, the statute is limited in its scope. The plain language of the statute limits inspecting officers to inspecting fish "that the officer reasonably believes" are possessed incident to a regulated activity. If the officer reasonably believes the fish are possessed for commercial sale, then he or she has the ability to inspect without a warrant. The reasonable belief requirement imposes a limitation as to what fish may be inspected. Any inspection without a reasonable belief would be violative of the protections

against unreasonable searches. And, the statute is also limited in that only officers with the proper jurisdiction, the Marine Fisheries inspectors, may inspect. These limitations as to scope, coupled with the other limitations in the statute as a whole, constrain "the exercise of official discretion to the minimum enforcement measures required to assure reasonable compliance" with the regulations in the commercial fishing industry. *Tart*, at 499.

We further find that the obtaining of a warrant prior to inspection would not afford any extra protection to a participant in the commercial fishing industry. Other courts interpreting similar statutes have agreed. In *State v. Erickson*, 101 Wis.2d 224, 303 N.W.2d 850 (1981), the court found that the warrantless search by conservation

wardens of a truck being loaded behind a wholesale fish market was presumptively reasonable. The statute in that case authorized the inspection of "buildings, structures, vessels or vehicles, all pertinent equipment including nets . . . and any fish stored, processed, packed or held in the places to be inspected." *Erickson*, 101 Wis.2d at 226–27 n.3, 303 N.W.2d at 851 (quoting Wis.Stat. 29.33(6)). The court in *Erickson* took into consideration the implied consent doctrine and stated: "By accepting a commercial fishing license or permit from the state, . . . the holder effectively consents to spot inspections by state officials." *Id.* at 229, 303 N.W.2d at 852. The court went on to conclude that "a warrant requirement would only marginally increase a commercial fisherman's privacy and security from

governmental interference. Balancing the competing interests, we conclude that the security interest of licensed commercial fisherman must be subordinate to the enforcement needs of the state." *Id.*

In *Tallman*, 421 Mich. 585, 365 N.W.2d 724, the court upheld a commercial fishing statute which permitted inspection of a licensee's "fishing operations." *Tallman*, 421 Mich. at 630, 365 N.W.2d at 749. The *Tallman* court applied a "balancing of interests" test, an expanded version of the er test, including an examination of implied consent. The court found the statute to fall within the warrant exception for pervasively regulated industries. Another case, *People v. Harbor Hut Restaurant*, 148 Cal. App. 3d 1151, 196 Cal.Rptr. 7 (1983), upheld a warrantless inspection of a walk—in freezer for the

purpose of verifying information found in the business records of a wholesale fish dealership. The court in *Harbor Hut* found the inspection statutes, "when viewed in their totality and in light of the laws governing the regulation of commercial fishing, lead to the inescapable conclusion that inspections by officials . . . are sufficiently circumscribed so as to satisfy the requirements of the Fourth Amendment." *Harbor Hut*, 148 Cal.App.3d at 1156, 196 Cal.Rptr. at 10. In *State v. Westside Fish Co.*, 31 Or.App. 299, 570 P.2d 401 (1977), the court upheld a statute authorizing inspection of licensed wholesale fish dealers' premises for the purpose of enforcing the commercial fishing laws. Although the statutes involved in the cases above are not identical to the statute at issue here,

the principles articulated in these cases are applicable. The basic recurring theme is that where warrantless searches relating to the fishing industry are at issue, courts must balance the public interest against the privacy interests of commercial fishers in deciding the reasonableness of warrantless inspections. Where the *Burger* test is satisfied and the public interest outweighs a minimal intrusion, as in the case at bar, the statute does not violate the Fourth Amendment.

In sum, we conclude: (1) the coastal fishing industry is a pervasively regulated industry in our state· (2) the maintenance, preservation, and protection of our state's marine resources are substantial government interests; (3) the transient and disposable nature of fish subject to regulation dictate that an

effective inspection scheme, including warrantless administrative searches, is necessary to further the government's interests; (4) the commercial fisher has a low expectation of privacy and has constructive notice of periodic inspections; and (5) the statutory section authorizing the inspections is limited sufficiently as to time, place, and scope. After balancing carefully the interests of the government against the interests of the privacy of a licensed commercial fish dealer, we hold that the trial court erred in finding N.C.Gen.Stat. 113–136(k) unconstitutional on its face. The order is

Reversed.

JOHNSON, J., concurs.

GREENE, J., dissents.

GREENE, Judge, dissenting.

Although I agree with the majority that the North Carolina fishing industry is pervasively regulated and thus falls within the *Colonnade–Biswell* doctrine permitting warrantless inspections, I do not agree that the warrantless inspections allowed under Section 113–136(k) meet the reasonableness requirements set forth in *Burger*. *See New York v. Burger*, 482 U.S. 691, 702–03, 96 L.Ed.2d 601, 614 (1987). Specifically, in my opinion the statute does not sufficiently restrict the discretion of the inspecting officers.

I agree with the majority's characterization as "substantial" the State's interest in the maintenance, preservation, protection and development of our marine resources. Furthermore, for the reasons articulated by the majority, the ability of enforcement

officers to inspect without the requirement of a warrant furthers this substantial interest. Accordingly, I agree that the first two prongs of the *Burger* test are met. *See Burger*, 482 U.S. at 702–03, 96 L.Ed.2d at 614. However, I disagree with the majority's conclusion that Section 113–136 (k) , "in terms of the certainty and regularity of its application," serves as "a constitutionally adequate substitute for a warrant." *Id.* In order to comply with this third requirement, a statute authorizing warrantless inspections must (1) "advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope," and (2) "limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703, 96 L. Ed. 2d at 614 (citations omitted).

The notice requirement contemplates a statute which is "sufficiently comprehensive and defined" to put the owner of commercial premises on notice that his property "will be subject to periodic inspections undertaken for specific purposes," *Donovan v. Dewey*, 452 U.S. 594, 600, 69 L.Ed.2d 262, 270 (1981), and I agree that the portion of Section 113–136(k) at issue meets this requirement. The statute makes it unlawful to refuse to allow the inspection of fish (thus a fish dealer cannot help but know that periodic inspections of his fish will occur) that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule over which inspectors and protectors have enforcement jurisdiction (indicating that the purpose of an inspection is to

determine compliance with the regulatory scheme).

In addition to providing notice, however, the statute must also be "carefully limited in time, place, and scope." *United States v. Biswell*, 406 U.S. 311, 315, 32 L.Ed.2d 87, 92 (1972). With regard to place, Section 113-136 prohibits warrantless searches only "within the curtilage of a dwelling or of the living quarters of a vessel . . . . " N.C.G.S. 113-136(1) (Supp. 1991). Nothing in the statutory framework of Section 113-136 otherwise limits the places at which inspections may be performed, or the hours during which inspections may occur. The majority concludes that the failure of Section 113-136 to establish time restrictions is not fatal. However, the footnote in *Burger* upon which the majority bases its

conclusion addresses only the adequacy of a statute which fails to limit the *number of searches* that may be conducted of a particular business during any given period, not the hours during which such inspections may occur. The *Burger* Court concluded that the omission of limits on the frequency of inspections is not determinative of the statute's constitutionality "so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers." *Burger*, 482 U.S. at 711 n. 21, 96 L.Ed.2d at 619 n. 21 (although it did not limit the number of searches, statute at issue restricted conduct of inspections to "regular and usual business hours" of "vehicle-dismantling and related industries" to "examine records as well as any vehicles or parts of vehicles which are subject to

[the statute] and which are on the premises") . And although I am aware, as the majority notes, that courts have upheld statutes authorizing warrantless inspections which contain no restrictions as to the hours during which the inspections may take place, the pivotal factor in the court's rationale in each of these cases is the ongoing and unpredictable hours of operation of the regulated enterprise. *See, e.g., Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986) (warrantless inspection of commercial fishing vessels and surrounding vehicles, buildings, piers, or dock facilities); *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991) (warrantless documentation check of commercial fishing vessels); *United States v. Dominguez-Prieto*, 923 F.2d 464 (6th Cir. 1991), *cert. denied*, — U.S. ——, 114 L.Ed.2d 468 (1991)

(warrantless inspection of trucks). Section 113-136(k), however, does not limit the entities subject to warrantless inspections to those with unpredictable hours of operation, such as commercial fishing vessels. Rather, the statute permits the inspection of fish at any time day or night, wherever located — whether on a dock, on a boat, in a fish house, restaurant, building, or grocery store — and as often as the protector, inspector, or "other law enforcement officers" wish to inspect. The inspecting officer need only reasonably believe that the fish are possessed *incident to*, not in violation of, a regulated activity (or with regard to vehicles traveling along the primary highways of the State, that someone in the vehicle "is or has recently been engaged in an activity regulated by the

Wildlife Resources Commission"). The sole restriction in Section 113–136 prohibiting inspections within the curtilage of a dwelling or the living quarters of a vessel "is plainly insufficient to provide either a meaningful limitation on the otherwise unlimited discretion the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement." *People v. Scott*, 593 N.E.2d 1328, 1344 (N.Y. 1992). Consistent with the United States Supreme Court's interpretation of the federal Fourth Amendment, and with our own Constitution's prohibition against unreasonable searches and seizures, *see* N.C. Const. art. I, sec. 20, I would hold that in order for such warrantless inspections, in particular of fish houses and other businesses with regular hours

of operation, to be reasonable, greater restrictions on the inspecting officers, discretion are required. *See, e.g.*, N.C.G.S. 113–302.1 (1990) (reasonable warrantless inspection of premises by protectors to determine whether wildlife is possessed in accordance with applicable laws or rules limited to an appropriate time of day).

For the foregoing reasons, I conclude that the portion of Section 113–136(k) permitting the warrantless inspection of fish, wherever located and without limitation, is not a constitutionally adequate substitute for a warrant and is therefore in violation of the Fourth Amendment. Accordingly, I would affirm the trial court's order to the extent that it found Section 113–136(k)'s authorization of warrantless

inspections of fish to be unconstitutional.

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

V. Filed June 4, 1993

JIMMY RAY NOBLES No. 401A92 – Pitt

Appeal by defendant pursuant to N.C.G.S. 7A–30(2) from the decision of a divided panel of the Court of Appeals, 107 N.C. App. 627, 422 S.E.2d 78 (1992), reversing the order entered by Griffin, J., at the 11 February 1991 Criminal Session of Superior Court, Pitt County, granting defendant's motion to dismiss the charges. Heard in the Supreme Court 13 May 1993.

Michael F. Easley, Attorney General, by J. Allen Jernigan, Special Deputy Attorney General, for the State.

Pritchett, Cooke & Burch, by Lloyd C. Smith, Jr., David J. Irvine, Jr. and Lars P. Simonsen, for defendant–appellant.

PER CURIAM.
AFFIRMED.

113–136. Enforcement authority of inspectors and protectors; refusal to obey or allow inspection by inspectors and protectors.

(a) Inspectors and protectors are granted the powers of peace officers anywhere in this State, and beyond its boundaries to the extent provided by law, in enforcing all matters within their respective subject–matter jurisdiction as set out in this section.

(b) The jurisdiction of inspectors extends to all matters within the jurisdiction of the Department set out in this Subchapter, Part 5A of Article 7 of Chapter 143B of the General Statutes, Article 5 of Chapter 76 of the General Statutes, and Article 2 of Chapter 77 of the General Statutes, and to all other matters within the jurisdiction of the

Department which it directs inspectors to enforce. In addition, inspectors have jurisdiction over all offenses involving property of or leased to or managed by the Department in connection with the conservation of marine and estuarine resources.

(c) The jurisdiction of protectors extends to all matters within the jurisdiction of the Wildlife Resources Commission, whether set out in this Chapter, Chapter 75A, Chapter 143, Chapter 143B, or elsewhere. The Wildlife Resources Commission is specifically granted jurisdiction over all aspects of:

(1) Boating and water safety

(2) Hunting and trapping;

(3) Fishing, exclusive of fishing under the jurisdiction of the Marine Fisheries Commission; and

(4) Activities in woodlands and on inland waters governed by G.S. 113-60.1 to G.S. 113-60.3.

In addition, protectors have jurisdiction over all offenses involving property of or leased by the Wildlife Resources Commission or occurring on wildlife refuges, game lands, or boating and fishing access areas managed by the Wildlife Resources Commission. The authority of protectors over offenses on public hunting grounds is governed by the jurisdiction granted the Commission in G.S. 113-264(c).

(d) Inspectors and protectors are additionally authorized to arrest without warrant under the terms of G.S. 15A-401(b) for felonies, for breaches of the peace, for assaults upon them or in their presence, and for other offenses evincing

a flouting of their authority as enforcement officers or constituting a threat to public peace and order which would tend to subvert the authority of the State if ignored. In particular, they are authorized, subject to the direction of the administrative superiors, to arrest for violations of G.S. 14-223, 14-225, 14-269, and 14-277.

(d1) In addition to law enforcement authority granted elsewhere, a protector has the authority to enforce criminal laws under the following circumstances:

(1) When the protector has probable cause to believe that a person committed a criminal offense in his presence and at the time of the violation the protector is engaged in the enforcement of laws otherwise within his jurisdiction; or

(2) When the protector is asked to provide temporary assistance by the head

of a State or local law enforcement agency or his designee and the request is within the scope of the agency's subject matter jurisdiction.

While acting pursuant to this subsection, a protector shall have the same powers invested in law enforcement officers by statute or common law. When acting pursuant to (2) of this subsection a protector shall not be considered an officer, employee, or agent for the state or local law enforcement agency or designee asking for temporary assistance. Nothing in this subsection shall be construed to expand the authority of protectors to initiate or conduct an independent investigation into violations of criminal laws outside the scope of their subject matter or territorial jurisdiction.

(e) Inspectors and protectors may serve arrest warrants, search warrants, orders for arrest, criminal summonses, subpoenas, and all other process connected with any cases within their subject-matter jurisdiction. In the exercise of their law enforcement powers, inspectors are subject to provisions relating to police officers in general set out in Chapter 15, Chapter 15A, and elsewhere.

(f) Inspectors and protectors are authorized to stop temporarily any persons they reasonably believe to be engaging in activity regulated by their respective agencies to determine whether such activity is being conducted within the requirements of the law, including license requirements. If the person stopped is in a motor vehicle being driven at the time and the inspector or

protector in question is also in a motor vehicle, the inspector or protector is required to sound a siren or activate a special light, bell, horn, or exhaust whistle approved for law-enforcement vehicles under the provisions of G.S. 20-125(b) or 20-125(c).

(g) Protectors may not temporarily stop or inspect vehicles proceeding along primary highways of the State without clear evidence that someone within the vehicle is or has recently been engaged in an activity regulated by the Wildlife Resources Commission. Inspectors may temporarily stop vehicles, boats, airplanes, and other conveyances upon reasonable grounds to believe that they are transporting taxable seafood products; they are authorized to inspect any seafood products being transported to determine whether they were taken in

accordance with law and to require exhibition of any applicable license, tax receipts, permits, bills of lading, or other identification required to accompany such seafood products.

(h), (i) [Note: Repealed by Session Laws 1979, c. 830, s. 1.]

(j) The refusal of any person to stop in obedience to the directions of an inspector or protector acting under the authority of this section is unlawful. A violation of this subsection is punishable by a fine of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), imprisonment not to exceed 30 days, or both.

(k) It is unlawful to refuse to exhibit upon request by any inspector, protector, or other law enforcement officer any item required to be carried by any law or rule as to which inspectors

or protectors have enforcement jurisdiction. The items that must be exhibited include boating safety or other equipment or any license, permit, tax receipt, certificate, or identification. It is unlawful to refuse to allow inspectors, protectors, or other law enforcement officers to inspect weapons, equipment, fish, or wildlife that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction.

(1) Nothing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures.

(1915, c. 84, s. 6; 1917, c. 290, s. 2; C.S., s. 1885; 1935, c. 118; 1957, c. 1423, s. 2; 1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28, 86; c. 1286, s. 17; c. 1297; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1987, c. 641, ss. 20, 22; c. 827, s. 98; 1991, c. 730, s. 1.)

113–164. Rules as to possession, transportation and disposition of fisheries resources.

The Marine Fisheries Commission may make reasonable rules governing possession, transportation, and disposition of fisheries resources by all persons, including those not subject to fish-dealer licensing requirements, in order that inspectors may adequately distinguish regulated coastal fisheries

resources from those not so regulated and enforce the provisions of this Article equitably and efficiently. Such rules may include requirements as to giving notice, filing declarations, securing permits, marking packages, and the like.

(1965, c. 967, s. 2; 1973, c. 1262, s. 28; 1983, c. 570, s. 19; 1987, c. 827, s. 98.)

Supreme Court, U.S.
FILED
OCT 1 1993
OFFICE OF THE CLERK

No. 93-360

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JIMMY RAY NOBLES,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

On Petition For A Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 3

I. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT N.C. GEN. STAT. § 113-136(K), AUTHORIZING WARRANTLESS ADMINISTRATIVE INSPECTIONS OF LICENSED COMMERCIAL FISH DEALERSHIPS, SUFFICIENTLY LIMITS THE DISCRETION OF INSPECTING OFFICERS SO AS TO SURVIVE A FACIAL CHALLENGE UNDER THE FOURTH AMENDMENT. 4

A. PETITIONER DOES NOT MEET THE STANDARD OF REVIEW FOR A FACIAL CHALLENGE. . . . 6

B. N.C. GEN. STAT. § 113-136(K) SATISFIES FOURTH AMENDMENT STANDARDS FOR WARRANTLESS ADMINISTRATIVE INSPECTIONS OF CLOSELY REGULATED INDUSTRIES. 9

C. N.C. GEN. STAT. § 113-136(K) SATISFIES THE TIME, PLACE AND SCOPE RESTRICTIONS OF *NEW YORK V. BURGER*, 482 U.S. 691 (1987). 11

CONCLUSION 21

TABLE OF AUTHORITIES

CASES: **Page**

Betchart v. California Dept. of Fish and Game,
158 Cal. App. 3d 1104,
205 Cal. Rptr. 135 (1984) 15

Colonnade Catering Corp. v. United States,
397 U.S. 72 (1970) 9

Donovan v. Dewey, 452 U.S. 594 (1981) 2, 9

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 7

Exotic Coins, Inc. v. Beacom, 699 P.2d 930
(Colo.), *app. dismissed*, 474 U.S. 892 (1985) 15

Gallagher v. City of Huntington,
759 F.2d 1155 (4th Cir. 1985) 13

Heath v. Alabama, 474 U.S. 82 (1985) 3, 18

Hosto v. Brickell, 265 Ark. 147,
577 S.W.2d 401 (1979) 16

Kim v. Dolch, 173 Cal. App. 3d 736,
219 Cal. Rptr. 248 (1985) 16

Lovgren v. Byrd, 787 F.2d 857
(3rd. Cir. 1986) 11, 13, 15, 19

Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980) 13

Matter of Dept. of Environmental Protection, Division of Water Resources of New Jersey, 177 N.J. Super. 304, 426 A.2d 534 (1981) 16

McLaughlin v. A.B. Chance Co., 842 F.2d 724 (4th Cir. 1988) 13

Mendez v. Arizona Bd. of Pharmacy, 129 Ariz. App. 89, 628 P.2d 972 (1981) 15

New York v. Burger, 482 U.S. 691 (1987) 2, 3, 9-12, 17, 18, 20, 22

Parker v. Levy, 417 U.S. 733 (1974) 8

People v. Firstenberg, 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 (1979), *cert. denied*, 444 U.S. 1012 (1980) 16

People v. Harbor Hut Restaurant, 147 Cal. App. 3d 1151, 196 Cal. Rptr. 7 (1983) 15

Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978) . . 17

S & S Pawn Shop, Inc. v. City of Del City, 947 F.2d 432 (10th Cir. 1991) 17

State of Florida v. Casal, 410 So. 2d 152 (Fla. Sup. Ct. 1982) 15

State of New Jersey v. Bromell, 251 N.J. Super. 85, 596 A.2d 1105 (1991) 16

State of New Jersey v. Turcotte,
239 N.J. Super. 285, 571 A.2d 305 (1990) 16

State of Oregon v. Westside Fish Co.,
31 Or. App. 299, 570 P.2d 401 (1977) 15

State of Wisconsin v. Erickson,
101 Wis. 2d 224, 303 N.W.2d 850 (1981) 15

State v. Hooper, 318 N.C. 680,
351 S.E.2d 286 (1987) 3

State v. Nobles, 107 N.C. App. 627,
422 S.E.2d 78 (1992), *aff'd per curiam*,
333 N.C. 787, 429 S.E.2d 716 (1993) . . 2, 10, 18, 19

State v. Nobles, 333 N.C. 787,
429 S.E.2d 716 (1993) 3, 6

State v. Santiago, 218 N.J. Super. 427,
527 A.2d 963 (1986) 15

Tallman v. Department of Natural Resources,
421 Mich. 585, 365 N.W.2d 724 (1984) 15

Tart v. Massachusetts, 949 F.2d 490
(1st Cir. 1991) 11, 13, 15

U.S. v. Kaiyo Maru, 699 F.2d 989
(9th Cir. 1983) 11

United States v. Biswell, 406 U.S. 311 (1972) . . 2, 19, 20

United States v. Dominquez-Prieto,
923 F.2d 464 (6th Cir. 1991),
cert. denied, 111 S. Ct. 2063 (1991) 15-17

United States v. Salerno, 481 U.S. 739 (1987) . . . 4, 12

United States v. Salerno, 481 U.S. 739 (1987);
applied in Ohio v. Akron Center for
Reproductive Health, 497 U.S. 502 (1990) 7

Village of Hoffman Estates v. The Flipside,
Hoffman Estates, Inc., 455 U.S. 489 (1982) 7

Village of Hoffman Estates, 455 U.S. 489 (1982),
quoting United States v. Mazurie,
419 U.S. 544 (1975) 8

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. I 7

U.S. CONST. amend. IV 2, 4, 5, 9, 15, 20

U.S. CONST. amend. IV (Warrant Clause) 3

N.C. CONST. art. I, § 20 2

STATUTES AND FEDERAL REGULATIONS:

16 U.S.C. § 1801 13

18 U.S.C. § 921 19

N.C. Gen. Stat. § 7A-30(2) 3

N.C. Gen. Stat. § 113-136 21

N.C. Gen. Stat. § 113-136(1) 13

N.C. Gen. Stat. § 113-136(b) 14, 21

N.C. Gen. Stat. § 113-136(f) 13

N.C. Gen. Stat. § 113-136(g) 13

N.C. Gen. Stat. § 113-136(k) 2-6, 8, 9, 11, 12
14, 16, 18, 19, 21

N.C. Gen. Stat. § 113-156 . . . . . 1, 14, 18, 19

N.C. Gen. Stat. § 113-156(c)(4) 19

N.C. Gen. Stat. § 113-156(d) 19

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No. 93-360

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JIMMY RAY NOBLES,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

On Petition For A Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner is the owner of private commercial property known as West End Seafood in Greenville, North Carolina, which is licensed as a fish dealership by the North Carolina Division of Marine Fisheries pursuant to N.C. Gen. Stat. § 113-156. As a licensed fish dealer, Petitioner brings fish to his place of business for sale.

On Tuesday, March 6, 1990, at about 10:15 a.m., North Carolina Division of Marine Fisheries Inspectors Jim Kelly and A. J. Rucienski made a request to inspect fish

located on the commercial premises of West End Seafood. Petitioner refused to allow Officers Kelly and Rucienski to inspect the fish. The officers subsequently obtained a search warrant and issued Petitioner a misdemeanor citation for unlawfully refusing to allow authorized inspection of fish located at his licensed commercial fish house, in violation of N.C. Gen. Stat. § 113-136(k). That statute makes unlawful, *inter alia*, the refusal to allow inspection of fish which are reasonably believed to be possessed incident to activities regulated under state fisheries laws.

The case was tried on February 11, 1991, before state Superior Court Judge William C. Griffin, Jr., on trial *de novo* from Petitioner's verdict of guilty on the misdemeanor charge, entered in the state District Court on July 11, 1990. The trial court granted Petitioner's pre-trial Motion To Dismiss the charge on the grounds that N.C. Gen. Stat. § 113-136(k) on its face violates the Fourth Amendment of the United States Constitution, and its counterpart in the Constitution of North Carolina, N.C. Const. art. I, § 20. Respondent appealed. The North Carolina Court of Appeals reversed in a divided opinion, *State v. Nobles*, 107 N.C. App. 627, 422 S.E.2d 78 (1992), concluding that the statute met the requirements for warrantless administrative inspections established by this Court in *New York v. Burger*, 482 U.S. 691 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981) and *United States v. Biswell*, 406 U.S. 311 (1972). Judge K. Edward Greene dissented solely on the question of whether the statute was adequately limited in "time, place and scope" so as to sufficiently restrict the inspecting officer's discretion under *Burger*. *State v. Nobles*, 107 N.C. App. at 641-44,

422 S.E.2d at 87-89. Petitioner appealed of right to the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-30(2). State law limited the scope of review in the Supreme Court of North Carolina to the subject matter of the dissent in the state Court of Appeals. *State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987).[1] On June 4, 1993, the North Carolina Supreme Court affirmed the state Court of Appeals in a *per curiam* decision, upholding the statute against Petitioner's facial challenge. *State v. Nobles*, 333 N.C. 787, 429 S.E.2d 716 (1993).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Allowing the writ of certiorari is not appropriate in this case. The North Carolina Supreme Court correctly applied this Court's decision in *New York v. Burger*, 482 U.S. 691 (1987), in determining that N.C. Gen. Stat. § 113-136(k) does not, on its face, violate the Warrant Clause of the Fourth Amendment. The decision below is also consistent with the opinions of United States Courts of Appeal in those Circuits which have construed similar state and federal acts, and with state appellate courts in a number of jurisdictions. In addition, the Petition omits that the statute is before

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[1] Accordingly, this is the only question which the Petition may properly present to this Court, and Petitioner's attempt to enlarge the issues should be rejected. Under this Court's practice commonly referred to as the "not pressed or passed upon" rule, certiorari should not be granted as to issues raised for the first time in the Petition and should only be granted, if at all, as to those questions which formed the basis of the state Court of Appeals' dissent. *Heath v. Alabama*, 474 U.S. 82 (1985).

this Court solely on a facial challenge, as that was the basis of the trial court's order and the only issue presented to the state Supreme Court and the state Court of Appeals. As a result, the Petitioner does not address his claim in light of the proper standard of review established by this Court for a facial challenge of a state statute. Petitioner cannot meet the requirement that he show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). For these reasons, the Petitioner presents no grounds to this Court for plenary review, and the writ should be denied.

I. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT N.C. GEN. STAT. § 113-136(K), AUTHORIZING WARRANTLESS ADMINISTRATIVE INSPECTIONS OF LICENSED COMMERCIAL FISH DEALERSHIPS, SUFFICIENTLY LIMITS THE DISCRETION OF INSPECTING OFFICERS SO AS TO SURVIVE A FACIAL CHALLENGE UNDER THE FOURTH AMENDMENT.

Petitioner presents a facial challenge to N.C. Gen. Stat. § 113-136(k) under the Fourth Amendment of the United States Constitution. The statute authorizes, *inter alia*, Fisheries Inspectors employed by the North Carolina Division of Marine Fisheries to conduct warrantless administrative inspections of fish located in commercial fish dealerships. The pertinent portion of the statute in question reads:

> It is unlawful to refuse to exhibit upon request by any inspector, protector or other law enforcement officer any item required by any law or rule as to which inspectors or protectors have enforcement jurisdiction. The items that must be exhibited include boating safety or other equipment or any license, permit, tax receipt, certificate, or identification. It is unlawful to refuse to allow inspectors, protectors, or other law enforcement officers to inspect weapons, equipment, fish, or wildlife that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction. (Emphasis added.)

N.C. Gen. Stat. § 113-136(k). Although the paragraph relates also to inspection of licenses and permits, and to unrelated items wholly within the jurisdiction of Wildlife Protectors employed by the North Carolina Wildlife Resources Commission, such as hunting weapons, wildlife, and boating safety equipment, the trial court struck the entire paragraph as facially invalid.

Although Petitioner was charged under N.C. Gen. Stat. § 113-136(k), his state appeal did not challenge the statute as applied to him, but instead contended that the act is unconstitutional on its face, as not sufficiently limiting the discretion of inspecting officers under the Fourth Amend-

ment.[2] As the Petition does not specify the appropriate standard of review for a facial challenge, Respondent briefly sets forth the applicable standard.

A. PETITIONER DOES NOT MEET THE STANDARD OF REVIEW FOR A FACIAL CHALLENGE.

This Court has enunciated the standard of review for a facial challenge to a legislative enactment as follows:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

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[2] The state Court of Appeals framed the issue thus:

> The only issue presented is whether the trial court decided correctly that N.C. Gen. Stat. § 113-136(k) on its face violates the constitutional right to be free from unreasonable searches and searches of commercial premises.

107 N.C. App. at 628, 422 S.E.2d at 79, *aff'd per curiam*, 333 N.C. 787, 429 S.E.2d 716 (1993).

United States v. Salerno, 481 U.S. 739, 745 (1987); *applied in Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). "In particular, facial challenges of a licensing or regulatory scheme are disfavored. '[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Petitioner's facial challenge meets neither the standard for overbreadth, nor that for vagueness. The Petition does not allege that the statute reaches a substantial amount of constitutionally protected conduct under the First Amendment of the United States Constitution; therefore, no overbreadth challenge is presented. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). The Petition also fails to satisfy this Court's criteria for questions of facial vagueness:

> [t]he court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of it applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. [footnote omitted.]

Id., at 494-95.

By refusing to allow inspection of fish being sold at his licensed fish house, Petitioner's conduct was clearly proscribed by the statute. Petitioner improperly seeks this Court's review of the statute's potential effect on persons who may never become subject to its provisions. It is well-settled that a defendant in a criminal prosecution can challenge the constitutionality of the law under which he is charged only on the basis that the statute unconstitutionally abridges his rights, not that it might conceivably be applied to others. *Parker v. Levy*, 417 U.S. 733, 756 (1974). Petitioner lacks standing to attack the statute beyond the context of warrantless inspections of fish on the commercial premises of licensed fish dealers, as "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Village of Hoffman Estates*, 455 U.S. at 495, n.7, *quoting United States v. Mazurie*, 419 U.S. 544, 550 (1975).

The Petition does not reflect that N.C. Gen. Stat. § 113-136(k) is "invalid *in toto* -- incapable of any valid application" per *Village of Hoffman Estates*, 455 U.S. at 494, n.5; therefore, review is not warranted. As Petitioner fails to show that no set of circumstances exists under which the enactment would be valid, the state Supreme Court properly concluded that the statute does not facially violate the Fourth Amendment prohibition against unreasonable searches and seizures, and the writ should be denied.

B. N.C. GEN. STAT. § 113-136(K) SATISFIES FOURTH AMENDMENT STANDARDS FOR WARRANTLESS ADMINISTRATIVE INSPECTIONS OF CLOSELY REGULATED INDUSTRIES.

While private businesses carry an expectation of privacy and freedom from unreasonable governmental searches under the Fourth Amendment, commercial property has a diminished, reasonable expectation of privacy as compared to private dwellings. *Donovan v. Dewey*, 452 U.S. 594 (1981). As the warrant and probable cause requirements have lessened application in the context of industries which are "closely regulated," because of the substantial public or governmental interest at stake,[3] this Court in *New York v. Burger*, 482 U.S. 691 (1987), recognized that warrantless administrative inspections of such industries pass constitutional challenge where the following requirements are met:

1) There must be a a substantial public or governmental interest requiring the regulatory scheme;

2) Warrantless inspections must be necessary to further the regulatory scheme; and

3) The inspection program must provide a constitutionally adequate substitute

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[3] *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

> for a warrant issuance: "it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."

Id., 482 U.S. at 702-3.

In the decision affirmed by the state Supreme Court, the state Court of Appeals unanimously concluded that "[t]he first two prongs of the [three-pronged] *Burger* test are satisfied easily [by the statute]." 107 N.C. App. at 631, 422 S.E.2d at 81 (majority opin.); 107 N.C. App. at 642, 422 S.E.2d at 82 (dissent. opin.). First, the court properly found the requisite "substantial governmental interest" in fisheries regulation under *Burger's* first prong. Thus, the industry is "closely regulated." Proceeding to *Burger's* second prong, the court then correctly found that warrantless inspections further the state's regulatory scheme to protect those interests. The court correctly recognized these established tenets on the basis that 1) fish are "highly perishable products" transported and disposed of easily; 2) the fishing industry is "highly variable," thus procuring a warrant is often impractical; and 3) imposing a warrant requirement would frustrate the effectiveness of the regulatory scheme. 107 N.C. App.

at 632-3, 422 S.E.2d at 82, *aff'd per curiam*, 333 N.C. 787, 429 S.E.2d 716.[4]

The lone federal question presented to the state Supreme Court was whether the statute was adequately limited in "time, place and scope" so as to sufficiently restrict the inspecting officer's discretion under *Burger*. 107 N.C. App. at 642-44, 422 S.E.2d at 88-9 (dissent. opin.). The third prong of the *Burger* test requires that warrantless inspections be limited and regular in nature so as to adequately serve as a procedural substitute for a warrant, by limiting the inspector's discretion in time, place and scope. *Burger*, 482 U.S. at 703. The state Supreme Court correctly concluded that the statute satisfies those requirements.

C. N.C. GEN. STAT. § 113-136(K) SATISFIES THE TIME, PLACE AND SCOPE RESTRICTIONS OF *NEW YORK V. BURGER*, 482 U.S. 691 (1987).

In *New York v. Burger*, this Court explained the requirements for "time, place and scope" limitations in a footnote in the opinion:

> . . . While such limitations, or the absence thereof, are a factor in an analysis of the adequacy of a particular statute, they are not

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[4] The state court opinion is consistent with those Circuits which have addressed similar questions related to regulation of fisheries resources. *See Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991); *Lovgren v. Byrd*, 787 F.2d 857, 866 (3rd. Cir. 1986); *U.S. v. Kaiyo Maru*, 699 F.2d 989, 996 (9th Cir. 1983).

> determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of the inspection officers. Indeed, we have approved statutes authorizing warrantless inspections even when such statutes did not establish a fixed number of inspections for a particular time period. And we have suggested that, in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme.

Burger, 482 U.S. at 711, n.21 (citations omitted).

The Petition, without citation of other authority, contends that N.C. Gen. Stat. § 113-136(k) "fails the *Burger* analysis" for eight reasons. (Petition, pp. 16-18). Petitioner's claims are inappropriate for this facial challenge; while they speculate as to possible unconstitutional operation of the statute, the Petition fails to show that no set of circumstances exists under which the statute would be valid. *United States v. Salerno*, 481 U.S. at 745. Respondent will examine these broadside attacks *seriatim*, establishing that each affords no basis for review by this Court.

First, Petitioner contends the statute lacks "meaningful restrictions as to place, specifically licensed premises or vehicles." (Petition, p. 16). This contention is meritless, as the statute restricts the inspection to only those places where the items enumerated, i.e., fish or equipment, are possessed incident to regulated activity, such as in a fish house, or aboard a fishing vessel. Even then, a warrant must be

obtained to inspect within dwelling curtilage or vessel living quarters, as N.C. Gen. Stat. § 113-136(1) prohibits warrantless inspections therein. N.C. Gen. Stat. §§ 113-136(f) and (g), not challenged below, separately govern vehicle stops.

Several United States Circuit Courts of Appeal reviewing warrantless inspections in the context of fisheries regulation have reached the same result as the Supreme Court of North Carolina.[5] For example, the Third Circuit Court of Appeals upheld a regulation adopted pursuant to the Magnuson Fisheries and Conservation Management Act, 16 U.S.C. § 1801, *et seq.*, a federal fisheries conservation statute, authorizing warrantless inspections at "those times when and those places where groundfish may be found," as sufficiently limiting the discretion of inspecting officers. *Lovgren v. Byrd*, 787 F.2d 857, 867 (3d Cir. 1986). In *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991), the First Circuit held that under *Burger* "the governing statute need not in all circumstances prescribe exhaustive restrictions limiting the target, time and place of the inspection." 949 F.2d at 498. Because of the highly variable nature of the fishing industry, these courts have recognized that it is simply not practical for the legislature to enumerate every

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[5] The United States Court of Appeals for the Fourth Circuit has upheld warrantless inspections in the following cases: *McLaughlin v. A.B. Chance Co.*, 842 F.2d 724 (4th Cir. 1988) (warrantless inspection of OSHA records upheld); *Gallagher v. City of Huntington*, 759 F.2d 1155 (4th Cir. 1985) (warrantless inspection of precious stones and metals dealer upheld); *Marshall v. Sink*, 614 F.2d 37 (4th Cir. 1980) (warrantless inspection of coal mine under Federal Coal Mine Health and Safety Act upheld).

conceivable place where inspection may be appropriate. As previously noted, Petitioner does not even suggest that Respondent improperly applied the statute to the inspection of fish at his licensed commercial fish house.

Second, Petitioner contends the inspections "are not restricted to the regulated industry as anyone reasonably believed to possess marine fisheries resources is subject to the search authority of any law enforcement officer." (Petition, p. 17). This statement is inaccurate for several reasons.

Petitioner's description of the authority of Fisheries Inspectors is misleading. The scope of an inspection by a Fisheries Inspector under N.C. Gen. Stat. § 113-136(k) is expressly limited to "weapons, equipment, fish, or wildlife that the officer reasonably believed to be possessed incident to an activity regulated by any law or rule as to which inspectors . . . have enforcement jurisdiction." The enforcement jurisdiction of inspectors is restricted by N.C. Gen. Stat. § 113-136(b) and does not include general law enforcement powers. Thus the scope of authorized warrantless inspection under the challenged provision is specifically limited to equipment and fish possessed incident to regulated activities,[6] as inspectors do not have subject matter jurisdiction over wildlife and weapons under N.C. Gen. Stat. § 113-136(b). Petitioner does not contend that the scope of the

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[6] Operation of a fish dealership licensed under N.C. Gen. Stat. § 113-156 is a regulated activity within the meaning of N.C. Gen. Stat. § 113-136(k).

inspection he refused was outside the ambit of the statute, or that the statute violates the Fourth Amendment by authorizing inspection of fish sold at commercial fish houses. The First, Third and Sixth Circuits have approved similar limitations on the scope of inspections. *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991); *Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986); *United States v. Dominquez-Prieto*, 923 F.2d 464 (6th Cir. 1991), *cert. denied,* 111 S. Ct. 2063 (1991).[7]

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[7] Similar restrictions on the scope of inspections have been upheld by state appellate courts as adequately limited. *Tallman v. Department of Natural Resources*, 421 Mich. 585, 630, 365 N.W.2d 724, 745 (1984) (upheld Michigan statute limiting the scope of authorized warrantless inspections to a licensee's "fishing operations." Remanded on question of whether authorizing inspections "at any time" was necessary to carry out the purposes of the enactment. 421 Mich. at 633-34, 365 N.W.2d at 746); *Betchart v. California Dept. of Fish and Game*, 158 Cal. App. 3d 1104, 1110, 205 Cal. Rptr. 135, 139 (1984) (upheld warrantless entries on private lands by game wardens "where game is present and hunting occurs"); *State of Oregon v. Westside Fish Co.*, 31 Or. App. 299, 302-303, 570 P.2d 401, 402 (1977) (approved warrantless inspection of "all canneries, cold storage houses, packing establishments, business places, boats, fishing gear, and all property used in the taking, processing and packing of food fish, for the purpose of enforcing the commercial fishing laws"); *State of Florida v. Casal*, 410 So. 2d 152 (Fla. Sup. Ct. 1982) (warrantless inspection of fishing vessel upheld); *People v. Harbor Hut Restaurant*, 147 Cal. App. 3d 1151, 196 Cal. Rptr. 7 (1983) (warrantless inspection of wholesale fish dealer's unlocked walk-in cooler upheld); *State of Wisconsin v. Erickson*, 101 Wis. 2d 224, 303 N.W.2d 850 (1981) (warrantless search of truck transporting fish upheld); *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo.), *app. dismissed*, 474 U.S. 892 (1985) (bare authorization for inspections construed to authorize warrantless inspections); *Mendez v. Arizona Bd. of Pharmacy*, 129 Ariz. App. 89, 628 P.2d 972 (1981) (warrantless inspection of pharmacy records upheld); *State v. Santiago*, 218 N.J. Super. 427, 527 A.2d 963 (1986) (warrantless inspection of licensed pesticide applicator upheld);

(continued...)

Third, Petitioner contends "[t]here are no temporal restrictions" in the statute. (Petition, p. 17). That assertion is groundless, as N.C. Gen. Stat. § 113-136(k) satisfies *Burger* by restricting the time of authorized inspection to when fish or equipment are possessed incident to regulated activities, such as when fish are offered for sale by a licensed fish dealer. There is no dispute among the Circuits which have considered time restrictions for warrantless administrative inspections. This Court denied certiorari in *United States v. Dominquez-Prieto*, 923 F.2d 464 (6th Cir. 1991), *cert. denied*, 111 S. Ct. 2063 (1991), which upheld a state statute authorizing Tennessee Public Service Commission enforcement officers to stop motor carriers and inspect their freight "upon reasonable belief that any vehicle is being operated in violation of any provision of this part." The Sixth Circuit Court of Appeals found the only material distinction between the Tennessee statute and the inspection

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[7](...continued)
Kim v. Dolch, 173 Cal. App. 3d 736, 219 Cal. Rptr. 248 (1985) (warrantless inspection of massage parlors upheld); *People v. Firstenberg*, 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 (1979), *cert. denied*, 444 U.S. 1012 (1980) (warrantless inspection of skilled nursing facility upheld); *Matter of Dept. of Environmental Protection, Division of Water Resources of New Jersey*, 177 N.J. Super. 304, 426 A.2d 534 (1981) (state may condition wastewater discharge permit for chemical plant to allow warrantless inspections); *Hosto v. Brickell*, 265 Ark. 147, 577 S.W.2d 401 (1979) (warrantless inspection of pharmacist's records upheld); *State of New Jersey v. Bromell*, 251 N.J. Super. 85, 596 A.2d 1105 (1991) (warrantless search of auto-body repair facility upheld); *State of New Jersey v. Turcotte*, 239 N.J. Super. 285, 571 A.2d 305 (1990) (warrantless inspection of off-track stable housing licensed harness racing horses upheld).

scheme in *Burger* was the limitation on time, but determined that the Tennessee provision was nonetheless consistent with *Burger*, for the reason that "such a limitation would, of course, render the entire inspection scheme unworkable and meaningless. Trucks operate twenty-four hours a day and the officers must, necessarily, have the authority to conduct these administrative inspections at any time. Thus, this difference between the statutes is inconsequential." *Id.* at 470.[8]

The logistical problems in establishing a successful inspection program for the fishing industry throughout a state with extensive inland waters and a long sinuous coastline, such as North Carolina, are immense. A meaningful inspection system must involve warrantless searches in many circumstances. There is no other effective temporal alternative for an industry with such unpredictable hours of operation. For example, fish houses often pack and ship when the highly perishable fish become available. The record below shows that the inspection at issue was attempted during

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[8] Cases involving facial challenges in other circuits reached like results. *S & S Pawn Shop, Inc. v. City of Del City*, 947 F.2d 432, 438-39 (10th Cir. 1991) (upheld Oklahoma statute authorizing warrantless inspections of pawnshops at a "reasonable time" against a facial challenge); *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978) (upheld municipal ordinance purporting to leave the time of inspections of massage parlors to the discretion of police against a facial challenge. "Although it is conceivable that searches with great frequency could be unreasonable, the ordinance on its face does not authorize unreasonable searches.") *Id.* at 1015.

regular business hours, at about 10:15 a.m., on a Tuesday. Petitioner does not contend that time was unreasonable.

Fourth, Petitioner contends that the statute does not provide adequate notice to the affected population, which he describes as the general public. This concern is addressed together with his eighth contention that the inspections are not required to be conducted with such regularity as to place the public on notice. (Petition, pp. 17, 18). Neither has merit.

The state's regulatory scheme for the commercial fishing industry, which includes N.C. Gen. Stat. §§ 113-136(k) and 113-156 (fish dealer licensing), meets *Burger's* requirement that the statute place the regulated community on notice that its commercial property will be subject to periodic inspections. 107 N.C. App. at 633-35, 422 S.E.2d at 82-83 (majority opin.); 107 N.C. App. at 642, 422 S.E.2d at 88 (dissent. opin.).[9] Dealing in or selling fish is regulated pursuant to N.C. Gen. Stat. § 113-156, which requires a license from the state. The opinion below correctly concluded that by applying for and accepting a license to conduct a closely regulated business activity, commercial fish dealers like Petitioner have a reduced expectation of privacy and impliedly consent to periodic inspections of fish being sold on the premises as a regular component of the enforcement

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[9] Although Petitioner attempts to raise this issue, the question was not before the state Supreme Court, as it was not the subject of dissent in the state Court of Appeals; therefore, it is not properly the subject of this Petition. *Heath v. Alabama*, 474 U.S. 82 (1985).

scheme. 107 N.C. App. at 635-37, 422 S.E.2d at 83-84, *aff'd per curiam*, 333 N.C. 787, 429 S.E.2d 716.[10]

The holding below correctly followed *United States v. Biswell*, 406 U.S. 311 (1972). In that case, this Court found that warrantless inspections of a pawnshop owner for compliance with the Gun Control Act of 1968, 18 U.S.C. § 921, *et seq.*, posed only limited threats to the dealer's expectations of privacy: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business . . . will be subject to effective inspection." *Biswell*, 406 U.S. at 316. Similarly, licensed fish dealers, by electing to engage in a closely regulated business, are on notice that they are subject to reasonable and effective inspection under N.C. Gen. Stat. § 113-136(k). Moreover, those who fish, whether for pleasure or profit, are aware that fishing has a long history of being inspected. "Indeed, the expectation of finding the game warden looking over one's shoulder at the catch is virtually as old as fishing itself." *Lovgren v. Byrne*, 787

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[10] N.C. Gen. Stat. § 113-156 clearly indicates that inspections are a routine part of the licensing process. A licensed fish dealer must satisfy any other purchasing fish dealer that the fish were acquired in conformity with the law, and the statute mandates that it is ". . . unlawful for a fish dealer to purchase or sell or in any manner deal in fish except in conformity with the provisions of this section." N.C. Gen. Stat. § 113-156(c)(4). Further, upon application for a license, the fish dealer must establish a location where records will be available for inspection. "[R]ecords kept in connection with licensing, sale and tax requirements will be available for inspection when necessary." N.C. Gen. Stat. § 113-156(d). Consequently, in the context of the commercial sale of fish, inspections are predictable and expected.

F.2d at 865. Consequently, in the context of commercial fishing operations, particularly the commercial sale of fish, inspections are predictable and expected by the public.

Fifth, Petitioner complains there is no limitation on the frequency or duration of inspections. (Petition, p. 17). This contention is meritless, as *Burger* does not require enumeration of a certain number of inspections over a defined interval. As this Court noted in *Burger*, "Indeed, we have approved statutes authorizing warrantless inspections even when such statutes did not establish a fixed number of inspections for a particular time period. And we have suggested that, in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme." *Burger*, 482 U.S. at 711, n.21 (citations omitted). The statute, on its face, does not authorize searches of unreasonable frequency or duration, and Petitioner does not allege harassment.

Sixth, Petitioner urges that the statute improperly imposes a criminal penalty for refusing a warrantless inspection. (Petition, p. 17). This contention is specious. This Court has held that a statute may lawfully penalize one for resisting a warrantless search or inspection which complies with the Fourth Amendment. *United States v. Biswell*, 406 U.S. 311, 318 (1972).

Seventh, Petitioner contends that the "broad enforcement jurisdiction" of Fisheries Inspectors "creates a potential for the use of the warrantless search provisions to enforce other statutes or discover other criminal activity." (Petition,

p. 18). This contention should be rejected. This challenge to the "potential" application of the statute to others, like each contention discussed above, is improper in a facial challenge to this criminal prosecution. Further, the enforcement jurisdiction of Fisheries Inspectors is limited by N.C. Gen. Stat. § 113-136(b), and the scope of authorized inspections duly circumscribed. Petitioner does not allege that the inspectors came to his place of business in search of other criminal activity, or used the inspection of fish as a pretext for an unreasonable search of the premises.

Petitioner has stated no basis for granting the writ of certiorari; therefore, his Petition should be denied.

CONCLUSION

Petitioner has failed to meet the requirements of a facial challenge to N.C. Gen. Stat. § 113-136(k), as the Petition does not establish that there exists no set of circumstances under which the act would be valid. Further, the Supreme Court of North Carolina correctly determined that warrantless administrative inspections authorized by N.C. Gen. Stat. § 113-136 are appropriately circumscribed, and that the statute properly restricts the discretion of inspecting

officers in compliance with the Fourth Amendment. Therefore, the challenged provision on its face satisfies *New York v. Burger*, 482 U.S. 691 (1987), and the writ of certiorari should be denied.

Respectfully submitted,

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October 1, 1993

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